THE

# Madras Weekly Notes.

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KING GEORGE V

QUEEN MARY

## THE CORONATION.

It has been well said that the three English monarchs that ruled over India have all been peace-loving—only in different spheres and that their mission had been one of reconciliation, consolidation and union. Queen Victoria was the great reconciler of the throne to the people and the people to the throne. King Edward's services to his country were, rendered in the field of her foreign relations and to remove every cause of friction with the foreign powers. To our present sovereign has been reserved the arduous task of bringing together into one great bond of union the vast multiform portions of the British Empire. In the words of an Indian of note "There is a tendency especially in self-governing colonies to cast the Indians in the same fold with the savage races, forgetting that Indian civilization goes back to a time when the present nations of modern Europe were steeped in ignorance and barbarism and that it reached an eminence which, in many respects, has not yet been surpassed......The Indians are a sensitive people, proud and tenacious of their past achievements and the colonists would do well to remember that to deny them the ordinary rights of citizenship is not the way to lessen the difficulties of ruling the Empire." At this juncture, it is a bold stoke of statesmanship, to allay the

Indian feeling and to show to the colonials what a warm corner of his heart the Indian Empire holds, that His Majesty announced his determination to open the Durbar at Delhi personally. As the *London Times* had aptly expressed, His Majesty's presence at the Durbar is a further sign of "the good-will of the English to the peoples of India" and marks "the initiation of a new policy in the attitude of the Crown towards its Oversea Dominions, a policy attuned to the new development of the British Empire into a crowned Commonwealth of great autonomous nations."

This recognition of unity of the whole of his people at home and oversea is due no less to the fact that king George V is the first British Sovereign who has realised the Empire over which he rules, as he was the first king and probably the one man in all his dominions, who has seen it all and who has thus recognised the loyalty that holds together the many lands and the diverse peoples under his care in one good fellowship. Since the passing away of King Edward the Peacemaker, there has not been a pronouncement of His Majesty wherein he did not sound or strike this note and proclaim that his mission lay in the promotion and establishment upon impregnable foundations, the fraternal union of all parts of his world-wide Empire. Possessing, as king George does, a strong individuality, this sentiment cannot be mere matter of words with His Majesty and characteristically, the announcement came that His Majesty would be present at Delhi personally.

Again the sentiment of loyalty is deeply associated in the Indian mind with the throne and His Majesty would seem to have realised this important personal element in the Indian conception. The seeds of this loyalty were first sown when the Proclamation of 1858 was made transferring from the East India Company to the Crown, the kingdom of India. This was the first act in trying to attach the people of India to the British throne. The first real step was taken when King Edward as Prince of Wales visited India in 1875 and came into personal contact with the princes and people of India. A further step in aid of this new policy which was in consonance with native sentiments was the assumption of the title of Empress by the late Victoria the Good and the Durbar held at Delhi proclaiming the same in 1877. The results of these various acts were being slowly realised by the people and the princes of the land when the Delhi Durbar of 1903 under Lord Curzon's viceroyalty and the notable utterance of His Lordship regarding the sacred pledges of the Indian Magna Charta gave a rude shock to the peaceful progress of this sentiment. Then Lord Minto came as Viceroy and Lord Morley as Secretary of State for India. It was then that our Gracious Emperor visited this land as Prince of Wales and by his suave and courteous conduct both to the princes and the people, healed the wounds that were inflicted before. The wise words that His Majesty uttered on his return from the Indian Tour in the Guild-hall in London are still ringing in the ears of all: He said "I have realised the simplicity of love, the loyal devotion and the religious spirit which characterises the Indian people. I know also their faith in the absolute justice of our rule. I cannot help thinking from all I have heard and seen that the task of governing India will be made all the easier if, on our part, we infuse into it a wide element of *sympathy*. I have no

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doubt that to such sympathy there will be an everabundant and genuine response." Then came the great Reform Proposals of the Morley-Minto regime and the expansion of the Legislative Councils and the larger association of Indians in the Government of the country. The progress that has been till now achieved has come to be largely associated with the personnel on the British throne. Such was the impression that obtained in India when the news came that His Majesty would personally open the Durbar at Delhi and it is needless to add that the whole of India greeted the news with unbounded joy and looked forward to that memorable event to mark a new epoch for India.

Eyes were anxiously turned to Bombay and to the 3rd of December, when Their Majesties would land, and on that day in reply to the address of welcome in his usually characteristic and clear way His Majesty said "the knowledge that he gained during his last tour over a part of this vast country could not but deepen his sympathy with all races and creeds and that one of his first and most earnest desire was to revisit his good subjects in India." This speech only emboldened the Indians to expect something more momentous at the hands of His Majesty and agreeably thereto in addition to the usual boons of, presents to Government servants, Salutes, Honors and Titles to princes and people and the release of prisoners, stand in bold relief the first boon of a grant of 50 lacs for primary Education and the last boon announcing to the people the transfer of the seat of the Government of India from Calcutta to the ancient capital of Delhi and as a consequence of that transfer the creation of a Governorship for Bengal, of a new Lieutenant Governorship in Council for Behar, Orissa and Chota Nagpore and a Chief Commissionership for Assam.

Regarding the first boon we were already sufficiently apprised of His Majesty's interest in the children of the Nation by his innovation of inviting 100,000 children from the elementary schools of London to celebrate his crowing at the Crystal Palace last June. The *Contemporary Review* speaking of this matter said "it was but a small thing. But it was a new thing. It was due entirely to the king's own initiative and it betokens not only the true father's heart but a just sense of importance of putting the child first." And the same instinct is perceptible in the Coronation celebrations of the 12th of December. The treat to the school children formed an important element in the celebration at every place and it is but a fitting act crowning this sympathy that 50 lacs were allotted for primary education. In every civilised country the State accepts the education of the children as a primary duty resting upon it, and one important test of the solicitude of a Government for the true well-being of its people, is, as Mr. Gokhale said in moving his Bill, "the extent to which and the manner in which it seeks to discharge its duty in the matter of mass education." Since the introdution of the Bill by Mr. Gokhale there has been an universal agreement and support of the main principles of his Bill from almost every public body and every thinking man. And this earnest of 50 lacs with more to follow in years to come is in the words of the same redoubted leader, the beginning of "an attempt by Government to enable us to feel that, though largely foreign in personnel, it is national in spirit and sentiment."

Now we go to the last boon, which practically annuls the partition of Bengal by Lord Curzon. To this extent there will be universal rejoicing. It is a crowning stroke of statemanship and royal magnanimity that the settled fact of Lord Morley had been revoked by His Most Gracious Majesty and we have no doubt that as His Majesty anticipates this boon would conduce to the better administration of India and the greater prosperity and happiness of his beloved people. The gratitude of a whole nation goes to His Majesty for this noble act in deference to what has been sometimes ridiculed by the bureaucracy as sentiment. Public sentiment is another name for public opinion. There is no doubt there has been a graceful concession to public opinion and we must gratefully acknowledge the conciliatory spirit that actuates this concession. Ever since the expansion of the Legislative Councils, Public opinion has come to play a greater part in the deliberations of the councils of the land and it has now received the royal sanction. And we have no hesitation in saying that hereafter the administration of the country will be characterised by a steady policy of conciliation and sympathy. But the simultaneous announcement of the change of seat of the Imperial Government is not likely to evoke the same universal joy and we shall not mar the pleasure of the occasion by a detailed consideration of this matter at present. But we shall only say this that coming as the announcement does, directly from the mouth of His Majesty and remembering what a large concession has already been granted in annulling the Partition of Bengal, we must loyally accept the change and abide by the Royal command.

So far the expectations of the people and their faith in the personnel on the British throne have not been fruitless and it will not be in vain that they look forward eagerly to His August Majesty for India's national salvation to be ranked on a par with the self-governing colonies.

As the lotus opens at the rise of the sun, so does the Indian Nation blossom forth at the advent of Their Imperial Majesties. For in the chequered texture of our nationality the only golden thread that sets it out in bright relief is our common allegiance to the Imperial throne

"May you rule us long
And leave us rulers of your blood,
As noble till the latest day!
May childern of our childern say
That he wraght our people lasting good."

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## KINGSHIP IN THE EAST AND WEST.

It has been recently said of the Coronation of English Sovereigns that from the legal point of view the ceremony has lost its original force. (It is still of great importance, however, in view of the relation of the Sovereign to the Church of England,) since there no longer exists the need for the religious sanction of the title by election, nor does any interregnum intervene between the death of one Sovereign and the Coronation of another as happened down to the reign of Edward I. But to the Hindu mind the Coronation ceremoneis amount to a solemn sacrament quite emblematic of the prerogatives of the crown and the privileges of citizenship. Even in England the Coronation Oath is considered to contain the basic principle of constitutional monarchy namely, that the King

does, as it were, enter into a contract with his people—the reciprocal duties of the Sovereign and the subjects being protection and allegiance respectively. The present form of the Coronation Oath expresses, it will be remembered, all the duties that a monarch can owe to his people—to govern according to law; to execute Judgment in mercy; and to maintain the established religion. The primary duty of the Sovereign to govern his people according to law "is not only consonant to the principles of nature, of liberty, of reason and of society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest" [Steph. Comm. Court BK IV, Ch, II]. And as Bracton puts it—*Rex non debt ease suo homine, old sub Deo sub lege, quia lex facit regun* (Bract, Lib, I fo. 5)—the King is under no man; but he is in subjection to God and to the law; for the Lord makes the King. Fortesque also lays it down "that the King of England must rule his people according to the laws thereof, being bound, by an Oath at his Coronation, to the observance and keeping of such laws." And these provisions of the Common Law have been embodied and declared in the St. 12 and 13, William III, C. 2, "that the laws of England are the birth right of the people thereof; and all the Kings and Queens who shall ascend the throne of this realm ought to administer the Government of the same according to the said laws."

The legal position of the King that he is placed under the law and is subject to it is a component element also in the Hindu conception of Monarchy. But according to the jurists of Islam, the absolute sovereignty of the Prince carries with it the idea of the superiority of the Prince to all law the Prince himself being a living law. (1 M. H. C. R. 283.) In the Santhiparva, Rajadharma section, of the Mahabaratha, a very pointed explanation is given as to the source of kingly power by looking upon it as derived from Vishnu Himself subject to the King's duty to govern the people righteously according to the divine rules of Dandanithi.

स्थापनं चाकरोद्विष्णुः स्वयमेव सानातनः ।
नातिवर्तिन्यते काश्चिदाजंस्त्वाामीनि भारत ॥
तपसा भगवान्विष्णुसाविवेशच भूमिपम् ॥
शां ॥ ५९ ॥ १२७ ॥

This politicial creed that the power of the King is coupled with the duty of righteous Government is embodied also in he narration of the circumstances under which Manu accepted the proferred Kingship. Indeed the idea of a covenant between Manu and the other men of his age, the one promising to enforce Dharma and the other agreeing to pay taxes in consideration of protection and justice surely anticipated, by thousands of years, the theory of an original compact propounded by Hobbes and Rousseau Locke and Filmer. The formulae adopted at the ceremony of the Mahabhisheka a summary of which is recorded in Bk. VIII, ch. IV of the Aitereya Brahmana of the Rigveda, provide for long benedictions on the King, and elaborate rituals calculated to ensure the sovereign's happiness, independence, and universal sovereignty, but the winding up as given in the Vajasaneya Sanhita ends with an injunction from the prelate very similar to the oath administered by the Archibishop :—"If thou shalt be a good ruler, then *from this day* forth, judge the strong and the weak with equal justice: resolve upon doing good to the people always; and protect the country from all calamities."

In the portion of his work on *Government and Public Law* Manu wrote. "The King, even though a child, must not be treated lightly from an idea that he is a mere mortal; no, he is a powerful divinity who appears in a human shape. * * * * He who shows hatred of the King, through delusion of mind will certainly perish. Speaking again of the duties of the King he says "Let him act as a father to his people; let him act on all occasions without guile and never with insincerity. That King who through weakness of intellect oppresses his people, will together with his family be deprived both of Kingdom and of life."

Quite in keeping with the spirit of the ancient inauguration ceremonials in India, and almost as an echo of the coronation oath in England, is the ever memorable utterance of Queen Victoria the Good—an utterance ratified by her noble son the late Emperor Edward VII—which is rightly viewed by the people of this country as the Magna Charta of India. "We hold ourselves bound to the Natives of our Indian territories by the same obligations of duty which bind us to all our other subjects; and those obligations by the blessing of Almighty God. We shall faithfully and conscientiously fulfil."—Such are the words of the August Queen which are more in the nature of a solemn contract than a formal expression of the sovereign's pleasure.

Now, we shall proceed to analyse the foundations upon which Kingship is rested in the East and in the West. In the Western countries Kingship rests entirely on the will of the people. The problem has often faced the Western countries whether for the stability and permanence of Government the recognised head should be a King or a President. The will of the people is an insecure basis and the throne might be washed away in a cataclysm of mob frenzy. There is proof of this in the recent events in Portugal. The position of a monarch based upon the popular will alone is precarious and so upon what foundations is the state to rear its conception of monarchy, asks a learned writer in the recent *Hindustan Review.* The Hindu conception clearly answers the question. To add stability and permanence to this most important limb of the constitution, the Hindu sages very wisely attached divine sanctity to the ruling monarch and every Hindu is enjoined to look upon his Emperor as a great deity in the form of a human being. This has been called the divineright of kings. The deification of Roman Emperors the German Emperor Charlemagne's aspiration for divine honors, the utopia of a Holy Roman Empire and latterly the Stuart kings' dogma of divine right are unmistakeable indications that even in the west the idea was not foreign. In the East the divine right of kings was a spiritual dogma for the happy working of the body politic. The king was divine only in the eyes of the ruled. While the kings were held aloft as divine to the people, the former were told they were only human beings and were enjoined to act under the law. To the breach of this rule by the ruler and the ruled divine sanctions in the western sense were attached. Under such a comingling of rights and duties, paradoxical as it may seem, the prerogatives of the crown turn to be the privileges of the people.

In the west the divine right of kings was devoid of this spiritual flavor and assumed quite the contrary aspect in its materialistic atmosphere: The kings

regarded themselves as divine and hence as above law. The Lex Majesties was stretched in Rome to fantastic extremes by ruthless Emperors; and the law of treason was rendered more and more elastic especially by the Tudors. This led to a clear cleavage between the Royal house and the people and the theory of contract came to be slowly evolved till at the present day monarchy is made to rest on the pure will of the people. The passage to this contract theory was the scene of many a deposition of kings and many a popular Revolution to which even the English with their Aryan instinct were not immune. But happily they worked out the same theory as their Eastern brethren have done and have come to regard the king as an important branch of the contitution. Recent events have shown how the existence of the king helps the growth of the people's interests that in fact the quaint maxim has been reached that the prerogatives of the crown are the privileges of the people. To add to the power of the commons, old prerogatives of the crown are revived. A great constitutional writer remarks that the English constitution is full of hibernating parts—ancient statutes, disused prerogatives, derelict councils, which time cannot enervate nor desuetude destroy. Should a grave emergency arise a touch of the lawyer's wand will call them into life and review the vitality of their youth. In fact, while the power of the King in the constitutional development has declined, the power of the Crown has immensely grown, as by an imperceptible process of development, the exercise of the prerogatives of the crown has passed into the hands of the people. And thus with their brethren of the East, the English have constituted the Kingship a permanent part of their constitution.

In India loyalty became a part of the religious belief of the people and the King's divine character impressed their minds so completely that they even worshipped the king as an incarnation. Fortunately, therefore, Indian History knows no revolutions against the King; it records no Bills of Atainder against the ruling Monarch. On the other hand, our literature is brimful of the sacred character of the throne, and the supreme duty of the subject to respect and support it. In inimitable language does the Ramayana forewarn the people against the dangers of a kingless country. "In a state without a king not even the clouds give rain, nor is a handul of grain sown. There is no respect for truth. Young girls bedecked with ornaments cannot besport themselves in gardens outside the town in the evening nor can people sleep with open doors . . . Traders cannot move about . . . Like a river without water or a jungle without grass or herdsmen without cows is a state without a king. As the sight is essential to the body so is a king necessary to the state for the propagation of truth and religion."

## A QUESTION OF COMMERCIAL LAW.

BY SIR HORATIO SHEPHARD.

The case of *Veeraiyan* v. *Ponnusami* reported in [1911] 2 *M. W. N.* 340 presents a question in mercantile law of some interest. The facts were apparently as follows :—The defendant signed a promissory note in which he promised to pay a certain sum to "Chella Muppanar, agent of P. S. Muppanar or order;" Chella Muppanar endorsed the note in the plaintiff's favour with his own signature only. On these facts it was held that an action could not be brought by Chella Muppanar, P. S. Muppanar being the proper person to sue. The High Court evidently felt some doubts about their decision, for they fortify it by a reference to 'the habits of the people in this country' as justifying the inference which the Subordinate Judge had drawn. On what materials this observation was based does not appear. Probably there were none, and, unless a local usage was proved, it is not easy to see how evidence of habits of the people could affect the matter.

It is clear that the case had to be decided with reference to the law regarding negotiable instruments and particularly with reference to the Act of 1881. Section 28 of that Act, though it is not mentioned in the judgment, has a material bearing on it, for it says that an agent who signs his name to a promissory note without indicating thereon that he signs as agent or that he does not intend thereby to incur personal responsibility is liable personally on the instrument. Sections 35 and 36 further provide that any indorser of a note becomes, as a prior party to it, liable to subsequent holders. He becomes so liable under section 35 unless in his indorsement he has expressly excluded his liability. It follows that if the note after being indorsed by Chella Muppanar had been negotiated and passed into the hands of a third person that person could have held him personally liable. Apparently it was thought that the words of description given on the face of the note must be treated as if they had been added to the signature on the back of the note. But even on that supposition Chella Muppanar would not, had he negotiated the note, have escaped liability. Words of description are not enough ; there must be words indicating the signer's intention to exclude his liability. Although the Judgment refers to the cases it practically ignores their effect, for it is said that "no case has been cited which lays down that the *prima facie* inference in such a case must be taken to be that the note was executed for the benefit of the person described as agent of another." It is true that the question has generally arisen with reference to the signature of the person primarily liable on the instrument, not as in the present case with reference to the payee. But does that make any difference ? The same meaning must be given to words such as 'agent of A B.' or 'director of A. B. company' whether the name which precedes those words is that of maker, payee or indorser. In the passage just quoted the learned judges say in effect that there is a presumption that on a note made in favour of 'A. B. agent of C' C and not A. B. is the person. In other words they say that the maker of a note in such terms must be taken to intend that C., and not A B, shall be the person entitled to indorse the note and to give a receipt for the money. Apart from the cases which seem to us sufficiently strong in opposition to this view we can find no English case directly in point. But there is this signi-

ficant fact that in the United States where the law regarding negotiable instruments generally resembles the law of England, a special exception is at least, according to some authorities, made for the case where a bill is drawn in favour of a person as cashier of a bank or corporation. Such a bill (*e. g.* a bill made payable to John Smith, cashier of the U. S. Bank) is deemed to be payable to the bank or corporation and may be negotiated by the indorsement of the bank or corporation. This fact is mentioned by Sir. M. Chalmers in his notes on the English Act (see p. 121, Ed. of 1909) who observes that it is an exception of doubtful expediency.

A rule which by the New York Negotiable Instruments Law, 1871, is made applicable to cases in which banks or corporations are concerned but has not been adopted in England has by the decision of the Madras Court been extended to an ordinary case so that it might almost be thought that the learned judges had read the section of the enactment but forgotten the limitations contained in it. The decision is likely to give trouble in the future.

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## SPECIFIC PERFORMANCE.

BY SIR HORATIO SHEPHARD.

Some interesting questions regarding the law of specific performance have recently been discussed in the Judicial Committee. In *Mir Sar-warjan* v. *Fakharuddin* (34 Cal. 163) it was held by the Calcutta High Court that a contract for the purchase of land made by the manager of the estate of the minor respondent who was a Mahommadan, could, on its being shown that the purchase was beneficial to the minor, be specifically enforced against the vendor. The contract which was treated as if made by the minor's guardian was considered to be one which would bind the minor and therefore as it could be enforced against him might equally be enforced in his favour. Nothing was said as to the inconvenience of holding that a contract which might on the minor coming of age be repudiated should be enforced specifically.

The late Chief Justice made some observations on the doctrine of mutuality which Lord Macnaghten politely calls enigmatical, and in the result, it was held that on the facts found there was no want of mutuality.

Before the Judicial Committee the question of the applicability of the doctrine of mutuality does not seem to have been discussed with much elaboration, and Lord Macnaghten deals with it very briefly. It is permissible to regret the attitude of extreme reserve which characterizes the utterances of the Judicial Committee in these latter days, but in this particular instance there can be no difficulty in surmising the reasons which actuated the Committee.

The doubt as to the applicability of the doctrine of mutuality originated from the pronouncement of Mr. Stokes on page 931 of the 1st volume of the Anglo-Indian Codes. The view there started that the doctrine had been discarded by the Legislature was rejected by Norris, J. in *Fatima* v. *Debnauth*, 20 *Cal.* 508, but was accepted by the Madras Court in the subsequent case of *Krishnasami* v. *Sundarappayyar*, 18 Mad. 415. Since then there seem to be no reported cases on the point. Mr. Stokes's dictum was evidently made with reference to the intention which was in the mind of the draftsman. It was not supported by any reference to the language of the Act and it would be difficult to do so except by saying that it

is not mentioned specifically in the Act. On the other hand it has to be observed that there is nothing in Chapter II inconsistent with the doctrine and that as the whole chapter is taken bodily from English sources and cannot be understood without reference to them it is reasonable to infer that the particular doctrine was not intended to be abandoned. It represents in fact one of the 'judicial principles' on which according to section 22 the Court is to act; See Dart's Vendors and Purchasers, Ed. 1905, p. 1065—Mr. Stokes disparages the doctrine by saying that it was introduced from a desire for symmetry. But surely that is not a fair account of it. If justice requires that the Court shall not, except in specific cases, direct specific performance of a part of a contract (section 17) it may equally require that a contract consisting of reciprocal promises shall not be enforceable by one party where from personal incapacity to contract or from the nature of the contract specific performance cannot be obtained by the other party.

On the other question regarding the powers of a guardian or manager which has also been further considered in a later case, the Judicial Committee say as follows:—"It is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property." It must be remembered that the minor was a Muhammedan and that there was no proper guardian, and therefore the judgment cannot be taken to apply generally to the case of a proper guardian of a Muhammedan or the proper guardian of a Hindu contracting in regard to immoveable property. On the facts of the particular case the person who contracted to buy had no legal power to sell immoveable property on the infant's behalf. (*Giraj* v. *Kazi Hamid*, 9 All. 340, 346). But the observations of the Committee may perhaps be read as meaning that whatever powers of selling for beneficial purposes a guardian may under Hindu or Muhammedan law possess he has no power to bind the minor's estate by purchases of land. In *Watson* v. *Sham Lal*, 15 Cal. 8; 14 I. A. 178 the transaction was one of purchase by a widow as guardian but the question of the guardian's power to buy was not discussed. In almost all the other cases the question has regard to a sale whether it was made for purposes binding the infant. Because under Hindu law apart from statute the guardian has a limited power of disposing of the infant's estate, it does not at all follow that he has a like power of purchasing immoveable property. The point is one on which further light may be thrown by the judgment in the other case which is still pending.

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## THE MEANING OF 'FINAL ORDER', IN s. 2, cl. (15) OF THE STAMP ACT.

In continuation of our observations in [1911] 2 M. W. N. p. 109, we must confess that the difficulties indicated by the learned commentator, seem to our mind more imaginary than real. First of all, he says at p. 46 of his book:—"Then a question may arise whether a decree ought to be stamped at all before the appeal time should expire." Further on, "if the plaintiff in whose favour the decree is passed, fails to pay the duty, then the decree may not be issued, and a defendant who may wish to appeal will have to wait until the plaintiff chooses to pay the duty; nor is there any provision authorising the Court to call upon the de-

fendant to pay the duty which the plaintiff neglects to pay." There is a curious fallacy underlying the whole of this argument. It assumes that the final decree will be passed as a matter of course, that the plaintiff will have to pay the stamp duty before the decree is issued, and that thus it will be in his power, by withholding the payments to prevent the defendant from obtaining a copy of the decree and thereby delay the presentation of an appeal by him, which will of course be a manifest injustice to the defendant. The learned writer has, however, overlooked the distinction between ordinary decrees and those in partition suits, which is well pointed out by the Judges of the Calcutta High Court in 32 Cal. 483 at p. 491. Their Lordships say :—"Ordinarily the Judgment contains the decision as to the rights of the parties and directs what the relief granted is. The decree which follows, is merely the formal expression of an adjudication arrived at in the Judgment. After the Judgment is pronounced the parties are not required to do any act to enable the court to frame and sign the decree, and, as provided in Section 205, Civil Procedure Code, the decree has retrospective effect and bears the same date as the Judgment. But where, as in a suit for partition, the parties are required by law to do a certain act, and the court cannot frame its decree until such act is performed, the adjudication contained in the Judgment does not decide the suit.".

Again, on the same page. "A decree to be operative must, under the Indian Stamp Act, be engrossed on paper as required by that Act, and, until the Judge signs the *decree so engrossed*, it cannot be said that the suit has terminated." To the same effect is their Lordships' observation at p. 487 :—"No final decree was



then drawn and *could not be drawn*, as under S. 2, sub-sec. 15 of the Indian Stamp Act, the final order in a suit for partition is an instrument of partition within the meaning of that expression in the Act, and under Art. 45 of the First Schedule of the Act, the order was necessary to be engrossed on a non-judicial stamped paper."

It is, therefore clear that there can be no final decree passed in the suit until and unless the requisite stamp is supplied by the plaintiff ; and hence the difficulty suggested by the learned writer can never arise.

In the next place, it is asked whether "supposing that the decree of an Original Court requires to be stamped and has been stamped accordingly, and that such a decree is reversed in appeal, the party who paid the stamp is to get a refund of the value of the stamp or not." It seems to us obvious that he can never be entitled to a refund. It must be borne in mind in this connection that the Legislature has added the words "or any Civil Court" in the definition of an "instrument of partition," in the belief that people will evade the stamp duty payable on a partition deed by resort to Civil Courts and by availing themselves of the provision in clause 4 of S. 7 of the Court Fees Act, which leaves the valuation of the suit for purposes of Court fees entirely to the parties. That is to say, in effect the stamp which the plaintiff pays at the time of the final decree in a partition suit, only takes the place of the Court fees which the plaintiff in an ordinary suit will have to pay at its very institution.

Therefore the plaintiff in a partition suit who is unsuccessful in appeal, will be no more entitled to a refund of the stamp paid by him in the lower court, than the plaintiff in an ordinary suit will be in similar

circumstances entitled to recover the court fees paid by him on the plaint.

Lastly, it is asked whether if the original decree should require to be stamped, the decree on appeal, either confirming or modifying it, should be also stamped. Here, again we think not. The appellate decree in this case cannot be said to 'effect a partition' within the meaning of the definition. In fact the partition has already been effected by the final decree of the lower Court and is only confirmed or modified by the appellate decree.

Therefore the anomalies suggested by Mr. Jagannadha Iyer have absolutely no force in our opinion. We would also like to point out that these difficulties such as they are, cannot be got rid of by interpreting 'the final order' to mean an order in execution. Such an order will still be appealable; and all the above objections can be urged with equal force against their interpretation.

We feel, therefore, no hesitation in saying that Justice Bakewell's view is the correct one, and it has also got the support of the Calcutta and Bombay High Courts.

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## JEREMIAH'S CASE
### [1911] 2 M. W. N. p. 576.

We publish elsewhere an able judgment of Sundrier and Philipps, JJ., which deals with an important question under the Indian Evidence Act relating to the examination of the exact scope of Sec. 81. What does that section ask the court to presume as to Gazettes, newspapers, private Acts of Parliament and other documents? Does "genuineness" refer to the copy or to the contents of the document in question? Sundrier, J. is of opinion that the presumption of the genuineness of a newspaper does not include a presumption that it was printed and published by the person by whom it purports to be; that is to say, it does not include a presumption that the statements found therein are true and accurate. With this construction of the section we are in perfect agreement with the learned Judge. S. 56 of the Act declares that "no fact of which the court will take judicial notice need be proved." And the next section enumerates the various facts of which the court shall take judicial notice, one fact being "the accession to office.........if their appointment is notified in the *Gazette of India*, or in the *Official Gazette* of the Local Government." Again the Act provides in the 78th section, with reference to public documents, that "proclamations,....issued by Her Majesty.........may be proved by copies or extracts contained in the *London Gazette* or purporting to be printed by the Queen's printer." Lastly we have the section in question *viz.* 81, laying down the presumption as to the genuineness of gazettes, etc. What these sections contemplate would be very clear if we bear in mind the two aspects in which we have to view a public document. In one sense, the term refers to the mode of proving it; in the other, to what the document itself proves. In the first case can be included all documents which are of so public a nature that copies, instead of the original are admitted in evidence, *e.g.* pleadings in a Court. Under the second heading are grouped documents which are by themselves evidence of the facts contained therein *e. g.* the marriage register. Documents which are public as regards mode of proof may be said to include private Acts of Parliament, Acts of State, treaties, orders and regulations of the Government departments, records of Courts of Justice, official registers, and numerous documents

under special Acts of Parliament. And as Willis points out, "public documents which are available as media of proof consist for the most part either of the proceedings of some department of the State, or of some public authority acting under statutory powers for the benefit of the community, or of public records of specific classes of facts duly entered and kept by public officials in pursuance of a duty imposed on them in that behalf." It would, therefore, be apparent that the Indian Evidence Act is quite alive to this obvious difference in the evidentiary value of public documents. Section 81 of the Act read with section 78, clearly shows that the former only relates to the genuineness of the copy and not to that of its contents. For those public documents which are media of proof have been definitely stated *e.g.*, proclamations by His Majesty contained in the *London Gazette.* We may also refer, in this connection, to *R.* v. *Holt*, [1793], 5 T. R. 436 which lays down that the *London Gazette* is evidence of royal proclamations and Acts of State. Again copies purporting to be printed by order of Government are declared to be good proof of the proceedings of the Legislature (S. 78). Under the English law, public statutes are *prima facie* evidence of facts recited in their preamble. (*R.* v. *Sutlan* [1816] 1 *M.* & *S.* 532). The admission of secondary evidence of this kind has always to be regarded with considerable jealousy. In *R.* v. *Lowe* (48 *L. T. N. S.* 768) a case of fraudulent bankruptcy, a single sheet of the *London Gazette* was put in to prove the fact of a due adjudication of bankruptcy. Lord Coleridge observed. "It is obvious that it would be dangerous to allow cuttings from the *London Gazette* to be assumed to be all that the statute requires to be produced in evidence of publication in the *London Gazette.*" There is, thus, no limit to which an ingenious suitor may strain the provision relating to the admissibility of secondary evidence. And we welcome therefore the authoritative pronouncement of the learned Judges discountenancing any elastic interpretation of the statute on the subject.

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## RYOTI LAND AND PRIVATE LAND.

(*Continued from page* 48).

The decision of the question whether lands which were originally classed as *seri* lands but which were let or treated as *kambattam* lands after they came into Zamindari possession does not therefore depend upon how the land was treated at the date of the commencement of the Act. Nor is it anywhere laid down in the Act or suggested in any of its provisions that the treatment of the land as private land at any particular time by the landholder *determines* the point. The first part of section 185 merely indicates the kind of evidence that may be taken into account in determining the question. Though the class of lands with which we are now dealing may satisfy the tests laid down in the first part of section 185 such as letting as private land before 1st July 1898 and so forth that does not conclude the question. On the other hand the provisions of sections 6 and 8 of the Act clearly indicate that there may be occupancy rights in lands which may have been specifically let as *kambattam* even for a longer period than the time that has elapsed since 1st July 1898. In the absence of evidence to the contrary that is in the absence of clear proof that the land was ryoti when it went into the Zamindar's possession, the letting as *kambattam* from before 1898 and the

other species of evidence referred to in the first part of section 185 will incline the Courts to hold that it is private land. But if evidence is available to prove to the satisfaction of the court dealing with the case that the land was clearly 'ryoti' when it passed into the landholders' hand it must be held that the land is not private land notwithstanding the fact that the land satisfies the requirements of the first part of section 185. The section says "*regard shall be had*"

i. to local custom and

ii. to the question whether the land was before the 1st day of July 1898 specifically let as private land and

iii. to any other evidence that may be produced.

The words "regard shall be had" clearly indicate that the presumption of the private character of the land arising from the three kinds of evidence enumerated above is rebuttable by proof to the contrary, *i. e.*, by proof of the fact that the land was ryoti at the inception.

Then with regard to the three kinds of evidence set forth in the section quoted above it is clear that while the first species of evidence "local custom" may be proved without any limitation as to the time of its prevalance, the second and the third species of letting and other evidence will be relevant only if they are shown to have been available before the 1st day of July 1898.

With regard to the 2nd species of evidence it is strongly contended for the landholders that admissions made by tenants after first July 1898 in muchalikas executed by them to the effect that the land let to them was the landholder's private land are also admissible against them and will at least have the effect of shifting the burden of proof on to the tenants; in other words the presumption against the land being a private land laid down by section 185 will be got rid of by an admission of the nature referred to. But this contention seems to be opposed to the plain wording and the intention of the section. Such an admission as that is absolutely irrelevant and is inadmissible in evidence. When a similar contention was put forward on behalf of a landholder under the corresponding section of the Bengal Tenancy Act (Section 120) in *Masudan Singh* v. *Goodar Nath*, 1 C. L. J. 456, Harington, J. said as follows, "I do not think that the admission made that the land was let after March 1883 as *Kamat* is sufficient. It is an admission made in a contract between the landholder and the tenant. Under section 178 it cannot bar the tenant from acquiring a right of occupancy under the Act. As I read section 178 it has the effect of preventing a landholder and a tenant by the terms of their contract from converting into proprietor's private land that which does not fulfil the conditions of section 120." Similarly in *Shev Bahadur* v. *M. H. Mackenzie*, 7 C. W. N. 400, it was decided that "the letting here contemplated does not exclude any letting to the party who may subsequently dispute the fact of the land being Tirait (private) and that being so, we do not think that the mere fact of the land having been taken lease of as Tirait (private) by the defendant would give to that fact any evidentiary value when the letting was not as the section requires to make it evidence before 2nd day of March 1883."

The third species of evidence is, no doubt not expressly limited by any words which confine it to any time-limit but reading the section as a whole it seems to me to be clear that evidence of treatment

of the land as private land by a landholder after 1898 is similarly irrelevant and inadmissible. The object of the section seems to be to frustrate the attempts of the landholders to defeat the intention of the legislature as expressed in the Draft Bills which were on the legislative anvil for over a decade. In *Nilmoni Chuckerbutti* v. *Bykant Nath Bera*, 17 *Calcutta* 466 the landholder attempted to put in evidence certain proceedings in two matters in 1885 and 1886 (after 1883) relating to settlement of certain *Khas* mehals within which the suit lands were situate and the recording of those lands in the names of the landholder on a claim set up by him that the land were his *nij-jote bromattar* lands. This assertion of title and the consequent record of the land as private land made in the settlement register after 1883 were held to be inadmissible in evidence. Their Lordships of the Calcutta High Court said "In this view we think that the following words in that sub-section "any other evidence that may be produced" must mean any other evidence tending in the same direction that may be produced to show the assertion of any title on the part of the proprietor, and communicated to the tenant before that date (2nd March 1883)."

I shall now proceed to deal with the second class of lands enumerated in the beginning of my article (*vide* [1911] 2 M. W. N. page 25), *viz.* lands originally classed as waste in the land-holder's accounts. It is a very well-known fact that *banjar* or waste lands in an estate were not the same as the private or *kambattam* lands of a land holder even before the passing of the Estates Land Act. From sometime before the passing of the Estates Land Act landholders began to let some of them as *kambattam* lands. This species of lands gives rise to some difficulty. Waste lands that were never cultivated before the Act fall under the definition of old waste. Waste lands that were brought under the plough by the landholder himself and cultivated by his own servants or hired labour with his own or hired stock for twelve years immediately before the Act are his private lands by virtue of the proviso to section 185. The difficulty arises only with regard to the other kinds of waste land. If ryoti land and private land exhaust all land in an estate some are for placing waste land under ryoti land and others are placing it under the head of private land. The definitions of ryoti and private land contained in the Act do not throw much light on the point. Those who contend that waste land is private land urge that the definition of private land deliberately seems not to exclude *waste land* while the definition of ryoti land does. From the fact that ryoti land is defined as "Cultivable land" they argue that uncultivable land does not fall under the definition and that by uncultivable land is to be understood, ordinarily land not made fit for cultivation at the particular time in question, such as the time of letting, &c., and not land which could never be made fit for cultivation. They further attempt to strengthen their argument by pointing out that the definition of old waste seems to recognise a difference between uncultivable and uncultivated land. It is evident that this reasoning is unsound. Any waste land that could be made fit for cultivation at any future time is cultivable land within the meaning of the definition of ryoti land and any argument based on the meaning of the negative of cultivate and the distinction that may be drawn between uncultivable and un-

cultivated land is unwarranted by the wording of the definition. It may be also pointed out that the *names* of the land used in the definition of private land clearly convey the idea of cultivated land and not of waste land. A mere perusal of sub-section 5 to section 6 will make it clear beyond any doubt that waste land reclaimed by the land holder is placed in the category of ryoti land by the Act. It is thus conclusive that waste lands fall under the head of ryoti lands.

This conclusion drawn from the provisions of the Act is also supported by the history of the waste lands. The Zamindars all along claimed them to be their private lands but the Government never gave any recognition to that claim. The arguments for and against the position taken up by the landholders are to be found fully set forth in the speeches of the Hon'ble Mr. Forbes and the Zamindar of Chunampet during the debate on the Bill. The extracts from the despatch of the Government of India which were quoted by the Hon'ble Mr. Forbes in his speech clearly show that neither the permanent settlement regulation nor the Sanads granted thereunder nor any other enactment ever passed by the Government had the effect of conferring on a landholder the power of converting waste land in an estate into his private land. No doubt he always had and still has the right of cultivating waste lands himself or of distributing it at his pleasure after receiving such premium as he pleased from the ryots who are admitted into possession thereof but he cannot convert it into his private land so as to prevent the acquisition of occupancy rights in it.

The proviso to section 185 makes it clear that except in the one contingency stated therein waste land cannot be converted into private land. The proviso is a large concession to the landholders and having regard to the real nature of waste lands it is really indefensible. The Hon'ble Mr. Forbes speaking on the proviso said "But in order to solve difficulties it has been declared here as in several other provinces, that whether the land is really *pannai* or not, if it has been cultivated as his private land by the Zamindar by his own servants or by hired labour with his own or hired stock for twelve years it shall be deemed to be his private land. I am not sure that it is not going too far; that is however my own opinion. We have followed what has been done in other provinces where this provision has enabled the landholder, I fear, to convert a good deal of ryoti land into private land." By limiting the operation of the proviso to cultivation carried on for twelve years immediately before the Act, it is no longer competent for the landholder to convert waste land into private land after the Act. It is equally clear that it was not competent for him to convert waste land into private land even before the Act except by the one method stated in the proviso.

So waste lands which were let as *Kambattam* lands would still be ryoti lands at the commencement of the Act.

The third class of lands, *viz.*, lands that were never classed as *seri* or waste but were classed as *Kamballam* do not present any difficulty whatever. Real *pannai* land will remain *pannai* land (private land) whether it is tenanted or not.

V. RAMADAS,
*High Court Vakil.*

## THE WEEK'S CASES.

4th December, 1911.

*Sundrier, J. and Spencer, J.*

**Ref. Trial No. 47 of 1911.**

In a charge of murder against the prisoner, it was found that the dead body was missing; but instead, 9 bones were produced, and they were alleged to be the bones of the skull of the deceased fractured by the act of the prisoner.

*Held* that before the certificate of the Chemical Examiner that these were bones of a human skull, can be acted upon as evidence against the accused, there must be evidence to show that the bones sent to the Chemical Examiner were those found near the place where the body was found buried.

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5th December, 1911.

*Sundarier, J. and Spencer, J.*

**Cr. Appeal No. 567 of 1911.**

The accused in obedience to a summons by a Civil Court to produced a promissory note, in his possession, produced it before the court. He was also examined as a witness, about the genuineness of the document. He gave evidence but it was disbelieved and the court found the document to be forged. The accused was accordingly charged and convicted of an offence under section 471, I. P.C *viz.* of having used a forged document.

*Held* (1) that the accused can be charged only of giving false evidence in a Judicial proceeding, and not of the offence of "using a forged document." Giving evidence about a document in Court as to its genuineness, is " not using " the document within the meaning of the above section.

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6th December, 1911.

*Ayling, J.*

**CRIMINAL REVISION CASE No. 559 of 1911.**

Allowing pigs to roam over a public place is not committing " Nuisance" within the meaning of section 268, I. P. C. and as such the act is not one punishable under section 290, I. P. C.

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14th December, 1911.

*Sundarier, J and Spencer. J.*

**S. A. 1159 of 1910.**

A female member governed by the Aliya Santana law, would be entitled to maintenance out her own family property, even when she was living with her own husband.

**S. A. 1027 of 1910.**

Where an appellate court pronounces Judgment in an appeal, during Christmas holidays, this is a mere irregularity and not an illegality vitiating the Judgment. Christmas holidays are not *dies non* for judicial purposes.

**S. A. 942 of 1910**

In a partition agreement it was arranged that a sum of Rs. 5,000/- should be paid by the three brothers to the other brother for the marriage expenses of his daughters. Sometime after this separate pro-notes were executed by the three brothers to the other brother. After a decree had been obtained for partition on the agreement the suit on the pro-note was instituted against two of the brothers for the amount payable by them. On the contention that the suit on the note was barred under section 43, C. P. C. of 1882 : *Held* that the note was the cause of action and not the original agreement and the suit was not therefore barred.

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## REVIEWS.

*Stevens's Elements of Mercantile Law, 5th Edition by Herbert Jacobs, Bar-at-Law. Publishers : Messrs. Butterworth & Co., London and Calcutta.*

This is one of the books that are brought out by Messrs. Butterworth & Co., as the Commercial Law series of elementary text books for commercial classes. Mercantile Law is evolved out of the Law of Contracts and the book deals also with the allied subjects of Bankruptcy, Arbitration Patents, Trademarks, and Copyrights. The statement of law is concise and accurate and the book is bound to be useful to every one connected with the Mercantile Law.

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*Indian Reports, Volume IV, Privy Council by Messrs. M. Subramanyam and M. V. Krishnaswamy, High Court Vakils, Madras and by the late Mr. T. V. Sanjiva Row.*

This volume completes the decisions of the Privy Council during the period 1811 to 1872 and includes some decisions that are not reported by Moore. In addition to this the book contains an exhaustive subject index for all the 4 volumes of the Indian Reports on very original lines. Not only the statement of the head notes but the many important dicta found in the judgments are also noted therein with the pages where such observations occur. The volume will therefore be useful eyen to those who possess a set of Moore's Indian Appeals.

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*The Indian Decisions, Old series, Volume II. Publishers : The Law Printing House, Mount Road, Madras.*

Mr. Venkasawmy Row the enterprising Law publisher and proprietor of the Law Printing House is taking the legal world by surprise by the quick and prompt issue of his volumes entitled *The Indian Decisions.* The first volume of the old series reached us in October and the first volume of the New series in November and the second volume of the old series has just reached us. Three gigantic volumes have gone out in succession at an interval of a month each and we have no doubt that the energetic organiser of this series will keep to his word and keep up this rate of production in connection with the coming volumes.

This volume deals with the cases of the Supreme Court of Bengal between the years 1847 to 59 reported by Taylor Taylor and Bell and by Gasper. Some of the reports are now quite inaccessible except for very fanciful prices to the profession and it is a real service done to the members that these reports are now made easily available to them. We have nothing else but praise for the neat get up of the volume so very characteristic of the Law Printing House.

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*English Constitutional History* by *Taswell-Langmead, Seventh Edition revised by Ashworth, Bar-at-law. Publishers : Messrs. Stevens and Haynes, London.*

This is one of those few books which ought to be found in the hands of statesmen, and legislators, lawyers and students. Its usefulness is bespoken to by the rapidity with which it has run to its seventh edition. Both in the method of presentation and in the matter that is embodised great skill and scholarship have been brought into play by the talented author and subsequently by the two succeeding editors Mr. Carmichael and Mr. Ashworth. Few historians of the English

Constitution have been able to equate the personal prejudice of party politics. And the chief merit of the book under review is in our opinion the author's honest and successful endeavour to keep aloof from all party spirit in describing the naturel and growth of English institutions. A short review by Mr. Ashworth, the Editor of the latest development of the constitution, is published at the end, and we draw particular attention to the same. The growth of Imperialism and Local Government, the rise of Socialism to power, the constitutional crisis of 1911, and the self-abnegation of the second chamber are all reviewed in their constitutional aspects. Being a standard work on the subject we have no doubt that it would continue to enjoy the popularity which it has had ever since it was first published.

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*Starling's Limitation Act—By Chamier and Nadkarni. Publishers : N. M. Tripathi & Co., Bombay.*

We have much pleasure in acknowledging receipt from Messrs. Tripathi & Co., a copy of Starling's commentaries on the Indian Limitation Act, revised and edited by Messrs. Chamier and Nadkarni. The present editors have retained the late author's work and have followed his classification of the subject and have adapted the work to the new Limitation Act. Much new and important matter has been embodied and the case-law has been brought up-to-date. And the book is very well got up. We are sure that the book will prove useful to the profession.

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*The law of Land Acquisition in British India by Henry Campbell. Publishers : N. M. Tripathi & Co., Bombay.*

This is a very useful publication. Part I contains an exhaustive commentary on the Land Acquisition Act of 1894. Parts II and III, contain The Land Acquisition (Mines) Act of 1885 and Extracts from the special Municipal Enactments. Part IV contains the rules framed under the Land Acquisition Act, by the several Local Governments. Containing as it does, all the laws and regulations on the subject, the book should be certainly of great usefulness to the profession. The commentary to each section deals critically with the Indian cases and in all possible anstances a reference to the English cases also is made. The get up of the book leves noih.ng to be desired.

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**The Coronation Souvenir Publishers.**

*The Guardian Press, Mount Road, Madras.*

We have great pleasure in acknowledging receipt of their beautiful Delhi Durbar Souvenir. It displays excellent taste and is printed in beautiful colours. Two blocks of Their Majesties and of their Majesties' children appropriately fill the centre while portraits of the Lord and Lady Crewe, Lord and Lady Hardinge, the Nizam of Hyderabad, the Maharajas of Mysore, Travancore and Cochin and Sir Gibson Charmichael and Lady Charmichael gracefully adorn the borders. The souvenir gives at the top portraits of the two other English Monarchs that ruled over India, Queen Victoria, King Edward and Queen Alexandra. At the foot of the grand sheet are represented the building and the work-shop of the Guardian Press wherefrom has issued this fine piece of workmanship. And we can safely add that the neat execution which is noticeable in this Souvenir usually characterises their other productions.